20 S. D. 18, 104 N. W. 522. *Contra*, *Walker* v. *State*, 8 Ind. 290. But a different result in New Jersey may be based on the criminal procedure statute which allows reversal only when the defect in form substantially prejudices the defendant in maintaining his defense. N. J. CRIM. PROC. ACT, 1898, § 163.

DEEDS — CONSTRUCTION AND OPERATION IN GENERAL — WARRANTY DEED OF TIMBER. — For consideration the plaintiffs by warranty deed conveyed to the defendant, its heirs and assigns forever, all pine and cypress timber on certain land with the right to enter on the land for full turpentine and timber purposes. Thereafter for ten years the defendants removed no timber, whereupon the plaintiffs filed a bill in equity for cancelation of the deed as a cloud upon their title. *Held*, that a decree of cancelation will be granted. *McNair & Wade Land Co.* v. *Parker*, 59 So. 959 (Fla.).

It was early decided that a fee simple in timber may be conveyed by deed. *Barrington's Case*, 8 Co. 136 *b*; *Clap* v. *Draper*, 4 Mass. 266. But such an agreement is so unusual in nature and involves such serious consequences to the grantor, that no deed should be so construed, unless such is the manifest intention of the parties. See *McNair & Wade Land Co.* v. *Adams*, 54 Fla. 550, 555, 45 So. 492, 494; *Pease* v. *Gibson*, 6 Me. 81, 84. In the principal case there is no absolute grant of all timber forever growing upon the land. And the conveyance of the timber at present there is for specific uses, which require it to be cut and removed. Such a conveyance has been rightly decided not to pass an absolute fee. *Patterson* v. *Graham*, 164 Pa. St. 234, 30 Atl. 247; *McNair & Wade Land Co.* v. *Adams*, *supra*. Some courts hold that by a constructive severance the trees become the grantee's chattels, but his right of removal lapses within a reasonable time or such time as the deed specifies. *Zimmerman* v. *Daffin*, 149 Ala. 380, 42 So. 858; *Hoit* v. *Stratton Mills*, 54 N. H. 109. A better view, however, since not based on a fiction, holds that title passes subject, by an implied condition, to defeasance on failure of the grantee so to remove. *McRae* v. *Stilwell*, 111 Ga. 65, 36 S. E. 604. *Cf. Saltonstall* v. *Little*, 90 Pa. St. 422. On this view the principal case is correct.

DIVORCE — ALIMONY — MODIFICATION OF A DECREE WHICH ADOPTED AGREEMENT BETWEEN THE PARTIES. — In a suit for divorce *a vinculo*, a decree for permanent alimony incorporating an agreement between husband and wife was granted to the wife. On the wife's remarriage, the husband petitioned for a modification of the decree in accordance with the changed conditions of the parties. *Held*, that the decree should not be modified. *Emerson* v. *Emerson*, 45 Chic. Leg. N. 122 (Circ. Ct. of Baltimore City). See NOTES, p. 441.

EMINENT DOMAIN — COMPENSATION — EFFECT OF CHANGE OF USE. — The defendant's assignor by eminent domain proceedings acquired the right to flood the plaintiff's land for his grist mill. An electric-light plant was later substituted for the grist mill. The plaintiff seeks to enjoin the flooding of his land for the electric-light plant. *Held*, that the defendant may continue to flood the land on paying for the damage sustained by the operation of the electric-light plant over and above that which would be sustained by the operation of the grist mill. *Lucas* v. *Ashland Light Mill & Power Co.*, 138 N. W. 761 (Neb.). See NOTES, p. 439.

EMINENT DOMAIN — COMPENSATION — MORTGAGEE'S CLAIM ON FUND PAID INTO COURT. — Land held under a lease was taken by eminent domain proceedings, and the value of the lessee's interest was paid into court. The lessee had mortgaged his term and was also in arrears in rent. The lease contained a stipulation giving the lessor a right to enter for default in rent, but this right had not been exercised at the time the eminent domain proceed-

ings were instituted. Both the mortgagee and the lessor claimed the fund in court. *Held*, that the mortgagee prevails. *In re Dublin Corporation*, [1912] 1 I. R. 498.

That land taken for a public use should remain encumbered by mortgages, liens, and similar rights would obviously defeat the purpose of eminent domain proceedings. Therefore, when the owners of such rights are properly made parties, the land is taken free and clear. *Moore* v. *Mayor, etc. of New York*, 8 N. Y. 110. See 2 LEWIS, EMINENT DOMAIN, 3 ed., § 896. But that such rights should be wholly extinguished is neither necessary to the purpose of the proceedings nor expedient. Accordingly, a wife's inchoate right of dower is transferred to the fund paid as compensation. *Wheeler* v. *Kirtland*, 27 N. J. Eq. 534; *Matter of Brooklyn Bridge*, 75 Hun (N. Y.) 558, 27 N. Y. Supp. 597. Tax liens survive against the fund. *Buchanan* v. *Kansas City*, 208 Mo. 674, 106 S. W. 531; *In re Sleeper*, 62 N. J. Eq. 67, 49 Atl. 549. And the same is true of those of judgment creditors. *Gimbel* v. *Stolte*, 59 Ind. 446. And it would seem that it should be true as to those of materialmen and vendors; in short, as to all real rights existing against the property. It is peculiarly inadvisable to weaken the security of mortgages. *South Park Commissioners* v. *Todd*, 112 Ill. 379; *Ex parte Lambton*, 3 Ch. D. 36. The same rules would apply to a landlord's lien; and even where the right to distrain confers only a right to acquire by seizure a lien superior to a prior mortgage, it is arguable that such a right should attach to the fund representing the tenant's goods. But the right to enter is not a lien on the term for back rent. It merely gives the lessor the right to end the term and prevent the accrual of future rent; and since the term is otherwise ended, it seems clear that he should have no lien on the fund. *Ex parte Carey*, 10 L. T. O. S. 37.

EQUITY — JURISDICTION — BILL TO ENJOIN ENFORCEMENT OF PENAL ORDINANCE. — The plaintiffs filed a bill to enjoin the enforcement of a penal ordinance of the defendant city, requiring insurance agents to pay a license before transacting business. *Held*, that the injunction will be denied. *City of Bisbee* v. *Arizona Ins. Agency*, 127 Pac. 722 (Ariz.).

Some courts hold that equity has no jurisdiction to enjoin criminal or penal proceedings. *Suess* v. *Noble*, 31 Fed. 855; *Old Dominion Telegraph Co.* v. *Powers*, 140 Ala. 220, 37 So. 195. Most courts, however, make exceptions in cases of multiplicity of suits or of irreparable injury to property. *Wilkie* v. *City of Chicago*, 188 Ill. 444, 58 N. E. 1004; *Mayor, etc. of York* v. *Pilkington*, 2 Atk. 302; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18. But in applying these exceptions the authorities are in conflict. Courts are more ready to enjoin penal than criminal proceedings. See *Southern Express Co.* v. *Mayor, etc. of Ensley*, 116 Fed. 756, 759; *Sylvester Coal Co.* v. *City of St. Louis*, 130 Mo. 323, 330, 32 S. W. 649, 651. Yet substantially the question involved is the same, and no distinction should be made. See *Shinkle* v. *City of Covington*, 83 Ky. 420, 429; *In re Sawyer*, 124 U. S. 200, 211, 8 Sup. Ct. 482, 488. Moreover, equity has discretion to refuse injunction even in cases of multiplicity. So where the question is one of fact which should go to a jury equity may refuse to interfere. *Davis* v. *American Society for Prevention of Cruelty to Animals*, 75 N. Y. 362. But when as in the principal case the question is one of law, equity should exercise jurisdiction. *City of Chicago* v. *Collins*, 175 Ill. 445, 51 N. E. 907. The authorities are also in conflict as to what constitutes irreparable injury to property. Some courts refuse to enjoin where a mere right to do business is affected. *Yellowstone Kit* v. *Wood*, 43 S. W. 1068 (Tex.). Other courts, however, correctly recognize that the right to do business is substantially a property right. *Greenwich Ins. Co.* v. *Carroll*, 125 Fed. 121; *City of Hutchinson* v. *Beckham*, 118 Fed. 399. On either theory, therefore, an injunction should have been granted in the principal case.